

08-868

SEP 18 2009

OFFICE OF THE CLERK

No. 08A114

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Pizzuti - PETITIONER
(Your Name)

vs.

United States - RESPONDENT(S)

ON PETITION *FOR* A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second
Circuit

(NAME OF COURT THAT LAST RULED ON
MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Pizzuti - Reg. No. 51089-054
(Your Name)

LSCI Allenwood, P.O. Box 1000
(Address)

White Deer, PA 17887
(City, State, Zip Code)

Not Applicable
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the District Court abused its discretion in permitting the prosecution to introduce, over defense objection, testimony of purported co-conspirator Marc Nickolson of statements made by purported co-conspirator Din Celaj following the June 9, 2001 incident at Perazzo's house; where there was no evidence the Petitioner, Michael Pizzuti, had ever been a co-conspirator of either Nickolson or Celaj?

2. Whether the District Court abused its discretion in excusing the twelve agreed upon jurors and ordering that jury selection begin anew after an incident in Court in which a Defendant— who was severed from the trial almost immediately— collapsed in pain from a serious illness, and the Defendants and Defense Counsel came to his assistance?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the Cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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COURT OF APPEALS FOR THE
SECOND CIRCUIT DATED
APRIL 22, 2008

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FOR THE SOUTHERN DISTRICT
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CASES

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United States v. Russo, 302 F.3d 37, 45 (2d Cir.
2002)

STATUTES AND RULES

Fed.R.Evid. 801(d)(2)(E)

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari
issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of
appeals appears at Appendix A to the
petition and is

☐ reported at _____; or,
☐ has been designated for publication but is
not yet reported; or,
☒ is unpublished.

The opinion of the United States district court
appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is
not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to
review the merits appears at
Appendix _____ to the petition and is

☐ reported at _____; or ;
☐ has been designated for publication but is
not yet reported; or,
☐ is unpublished.

The opinion of the _____ court
appears at Appendix to the petition and is

☐ reported at _____ or,
☐ has been designated for publication but is
not yet reported; or,
☐ is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 22, 2008

[x] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:
_____ and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. § 1254 (1).

For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date
_____ and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the
petition for a writ of certiorari was
granted to and including
_____ (date) on
_____ (date)
Application No. A.

The jurisdiction of this Court is invoked
under 28 U. S. C. § 1257(a).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

NOT APPLICABLE

STATEMENT OF THE CASE

The Petitioner's judgment of conviction arose following an eight week trial of the Petitioner and numerous co-defendants. It was alleged, inter alia, that the Petitioner, together with his co-defendants, and others, had conspired to extort an individual named John Perazzo in connection with a pyramid scheme orchestrated by Perazzo.

According to the indictment, a factor led by the Petitioner competed with a faction led by cooperating witness Maurizio Saginiti for the right to recover money owed them and their family and friends by Perazzo, but both factions eventually agreed to work together in order to maximize the likelihood that everyone could recover as much as possible. The indictment alleged that as part of their efforts, members of both factions used firearms and the threat of physical violence against Perazzo and engaged in efforts to cover up their interest in Perazzo's fraud, including deleting references to them on Perazzo's computer.

Petitioner seeks review of his conviction following a jury trial in which he was found guilty of one count each of substantive extortion and conspiracy to commit extortion in violation of 18 U.S.C. § 1951, one count of brandishing a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c), and one count of obstruction of justice in violation of 18 U.S.C. § 1512(b)(2). Petitioner was sentenced to 219 months imprisonment, three years supervised release, and a

fine of \$5,000, which included a mandatory 84 months sentence for the conviction of the firearms count.

REASONS FOR GRANTING THE PETITION

In the Petitioners case, Petitioner was convicted under circumstances where the victim did not testify and the governments evidence was essentially limited to testimony From two highly dubious cooperating witnesses. Despite the fact that defense counsel objected to the entry of Nickolson's testimony and Celaj's statements on the grounds there was no evidence that Petitioner, Nickolson and Celaj had ever been in a conspiracy together, the Court by Opinion & Order dated June 27, 2005, made the factual finding that the statements were made after two separate conspiracies to extort the victim merged into a single conspiracy to extort and during the course of and in furtherance of the conspiracy. Despite the principles discussed in United States v. Russo, 302 F.3d 37, 45 (2d Cir. 2002), the District Court concluded a single conspiracy came into existence on July 10, 2001, despite the fact that not a shred of evidence supported that conclusion nor that either Nickolson or Celaj ever acted as agents of Petitioner. The Petitioner was unduly prejudiced by the Opinion & Order dated June 27, 2005, since his conviction was premised on the Court's flawed deductive reasoning.

At *Petitioner's* trial, Petitioner was prejudiced by the dismissal of the twelve jurors chosen and deemed acceptable by the Government and defense counsel. The Government used the ostensible, momentary health crisis of a co-defendant who was obviously to be severed from the trial as a prop to advance its desire to begin jury selection anew.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'P' followed by a horizontal line.

Michael Pizzuti

Date: September 17, 2008

No. 08A114

**IN THE
SUPREME COURT OF THE UNITED STATES**

Michael Pizzuti — PETITIONER
(Your Name)

VS.

United States -RESPONDENT(S)

PROOF OF SERVICE

I, Michael Pizzuti, do swear or declare that on this date, **September 17, 2008**, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave, N.W.
Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing
is true and correct.

Executed on September 17, 2008.

A handwritten signature in black ink, consisting of a stylized 'P' followed by a horizontal line.

(Signature)
Michael Pizzuti

APP. A

06-1687 - cr (L)
USA v. Dipietro (Genua)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE

REFERENCE TO THAT DATABASE AND THE
DOCKET NUMBER OF THE CASE IN WHICH
THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of
Appeals for the Second Circuit, held at the Daniel
Patrick Moynihan United States Courthouse, 500
Pearl Street, in the City of New York, on the 22nd
day of April, two thousand and eight.

PRESENT

HON. JOHN M. WALKER, JR.,
HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER.
Circuit Judges.

UNITED STATES OF AMERICA, _____

—Appellee.

Nos. 06-1687-cr(L), 06-2677cr(CON),
06-2875-cr(CON), 06-3351 -cr(CON),
06-3395-cr(CON)

JOSEPH GENUA, ANGELO DIPIETRO, MICHAEL
PIZZUTI, ANGELO CAPALBO, HAROLD
BRINGMAN,

Defendant-Appellants.

For Defendant-Appellant Joseph Genua:

DENIS PATRICK KELLEHER,
Kelleher & Dunne LLP, New York, N.Y.

For Defendant-Appellant Angelo DiPietro:

WILLIAM I. ARONWALD, Aronwald & Pykett,
White Plains, N.Y.

For Defendant-Appellant Michad. Pizzuti:

BRENDAN WHITE, White & White (DiarMuid
White, *on the brief*), NewYork, N.Y.

For Defendant-Appellant Angelo Capalbo:

MARC FERNICH (Debra A. Karlstein, *on the brief*),
New York~ NY

For Defendant-Appellant Harold Bringrnan:

SUSAN G. KELLMAN, Brooklyn. N.Y.

For Appellee:

TIMOTHY J. TREANOR and ERIC B. BRUCE
Assistant United States Attorneys for Michael J.
Garcia, United States Attorney for the Southern
District of New York (Chi. T. Steve Kwok and
Jonathan S. Kolodner, *of counsel*), New York, N.Y.

Appeal from the United States District Court for the
Southern District of New York
(Kram, J.).

UPON DUE CONSIDERATION, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED that the
judgment of the district court is AFFIRMED.

Defendants-Appellants Joseph Genua, Angelo DiPietro, Michael Pizzuti, Angelo Capalbo, and Harold Bringman appeal from their conviction and sentences in the United States District Court for the Southern District of New York (Kram, J) on numerous counts arising out of the extortion of John Perazzo, robberies in New York and Florida and loansharking. We assume the parties familiarity with the facts, issues on appeal and procedural history of the Case.

Appellant Dipietro claims that his counsel, who had previously also represented Appellant Bringman, was improperly disqualified. We review a disqualification decision for abuse of discretion, *United States v. Locascio*, 6 F.3d 924, 931 (2d Cir. 1993) and we find *none* here. See *United States ex rel. Stewart v. Kelly*, 870 F.2d 854, 857 (2d Cir. 1989) (no abuse of discretion where a district court disqualified counsel from representing a client where "there was no guarantee that [the client's] interests could be served without vigorous cross-examination of [a former client of that attorney] in a manner wholly inconsistent with the [former client's] interests").

DiPietro also argues that one of his two convictions for possession of a firearm in furtherance of an extortion, in violation of 18 U.S.C. § 924(c), must be vacated, because the two were based on a single unit of prosecution. See *United States v. Wallace*, 447 F.3d 184, 187-88 (2d Cir. 2006) (holding that multiple convictions under § 924(c) cannot be based on offenses forming a single "unit of prosecution"). But the underlying offenses here formed two distinct units of prosecution—they comprised different extortion offenses, on different dates, in different places. Accordingly, the two § 924(c) convictions can both stand.

DiPietro moreover asserts that the court impermissibly refused to hear his counsel's objections to the jury charge. But the court allowed defense counsel to make objections on several occasions. The court is not required to listen to the same objection as many times as counsel cares to raise it. *See* Fed. R. Crim. P. 30(d) ("An opportunity must be given [to the defendant] to object [to a jury charge] out of the jury's & hearing...." (emphasis added)).

Appellant Genua argues that he was improperly prevented from raising a *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986), challenge to the Government's use of peremptory strikes during *voir dire*. Defense counsel said that he was "going to... make a *Ba/t/son* challenge," at which point the court asked him to wait, as it had other matters to attend to first. Counsel never mentioned the challenge again. Under these circumstances, we find that the *Batson* challenge was voluntarily abandoned.

Genua argues that several statements by the Government in its summation were impermissibly prejudicial. In making this argument, he "face[s] a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of [his] right to a fair trial." *Locascio*, 6 F. 3d at 945. He has not carried this burden.

Genua also claims that the district court erred in enhancing, pursuant to U.S.S.G. § 2B3.2(b)(3)(A)(iii), his Sentencing Guidelines offense level by five points for possession or brandishing of a firearm. A defendant can be held accountable in sentencing for the acts of a co-conspirator, so long as "the acts were within the scope of the defendant's agreement and ... they were foreseeable to the defendant." *United States v. Johnson*, 378 F.3d 230,

238 (2d Cir. 2004) (quoting *United States v. Studley*, 47 F.3d 569, 574(2d Cir. 1995)). Appellant bears the burden of demonstrating that he could not reasonably have foreseen that firearms would be used. *United States v. Martinez-Rios*, 143 F. 3d 662, 677 (2dCir. 1998), He has not carried this burden.

Appellants all assert that the district court's dismissal of the jury pool before the jury was sworn constitutes reversible error. We review this claim, too, for abuse of discretion. *United States v. Stewart*, 433 F. 3d 273, 303 (2d Cir. 2006). One of Appellants' co-defendants collapsed in court, moaning in pain, in full view of jurors and potential jurors. Several defense attorneys rushed to his aid, while the prosecutors did not. One defense attorney yelled to an FBI agent, in the presence of the jury, "[D]idn't they teach you CPR at the FBI Academy?" *United States v. DiPietro*, 385 F. Supp. 2d. 377, 378 (S.D.N.Y.2005). The trial court was in the best position to assess the likely impact of this event on the venire, see *Utteht v. Brown*, 127 S.Ct. 2218, 2224 (2007), and we do not find any abuse of discretion in its decision to dismiss the pool.

Various Appellants raise challenges to the sufficiency of the evidence against them. A defendant challenging the sufficiency of the evidence underlying a criminal conviction bears a "heavy burden," *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004) (internal quotation marks omitted), because this Court 'must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor.' *Id.* This Court also "resolve[s] all inferences from the evidence and issues of credibility in favor of the verdict" *United States V. Howard*, 214 F.3d 361,363 (2d Cir. 2000). In short "[r]eversal is warranted only if no rational

factfinder could have found the crimes charged proved beyond a reasonable doubt" *Gaskin*, 364 F.3d at 459-60. None of the sufficiency-of-the-evidence challenges meet this high bar.

Several Appellants also challenge the district court's decisions to admit certain evidence against them. We review evidentiary rulings for abuse of discretion, *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002) (per curiam), and we find none.

We have considered all of Appellants' other arguments, and we find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of the Court

By: _____

APP. B

FD-245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1RECEIVED
JUN 21 2006

UNITED STATES DISTRICT COURT

BY _____

SOUTHERN

District of

NEW YORK

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

Michael Pizzuti

Case Number

S(5) 02 Cr 1237 (4)(SWK)

USM Number:

51089-054

David Holland

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court☒ was found guilty on count(s) 2, 5, 6, and 10
after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1951	Conspiracy to Commit Extortion (Class C Felony)	Sept. 2001	2
18 USC 1951	Extortion (Class C Felony)	July 10, 2001	5
18 USC 924(c)(1)(A)(ii)	Brandishing a Firearm in Relation to a Crime of Violence (Class C Felony)	July 10, 2001	6

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☒ Count(s) on all underlying indictments ☐ is ☒ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

06-14-2006

Date of Imposition of Judgment

Signature of Judge

A TRUE COPY
J. MICHAEL McMAHON, CLERK

BY

DEPUTY CLERK

Hon. Shirley Wohl Kram, U.S.D.J.

Name and Title of Judge

Date

6/14/06